88-1028

No. .....

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

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MOIRA Q. SCANLON,

Petitioner,

v.

HOWARD M. SCHRINAR, COMMISSIONER OF PUBLIC LANDS, STATE OF WYOMING and AMOCO PRODUCTION COMPANY,

Respondents.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

———o———

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QUESTIONS PRESENTED

I. Whether the Fourteenth Amendment requires Wyoming's Public Lands Commissioner to abide by his own rules and regulations prior to extinguishing Mrs. Scanlon's right to remove sub-surface resources from state lands.

II. Whether the Wyoming Supreme Court's determination that an uncertified "speed memo" from an intermediate employee was a final, appealable order, denying them jurisdiction, was an adequate, non-federal grounds of dismissal to allow Mrs. Scanlon to be deprived of her property without due process of law.

LIST OF PARTIES

All of the parties before the Supreme Court of Wyoming are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

THOMAS E. CAHILL, on behalf of MOIRA Q. SCANLON, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Wyoming in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wyoming is reported in 759 P. 2d 1243 (Wyo. 1988). The Order of Certification to the Wyoming Supreme Court was

not reported. The final decision of the commissioner of Public Lands was issued on January 15, 1987, and is reproduced on page 14.

———o———

JURISDICTION

The Opinion of the Wyoming Supreme Court was entered on August 17, 1988. Petition for Rehearing was denied on September 20, 1988.[1]

Mrs. Scanlon claimed that Wyoming's Public Lands Commissioner "deprived" her of an exclusive right to drill for oil and gas on two sections of State Lands "without due process of law."[2] The Wyoming Supreme Court refused to consider her claim, finding "determinative jurisdictional defects."[3] In "substance and effect," The Wyoming Supreme Court put forward "non-federal grounds of decision that were without any fair or substantial support."[4] The jurisdiction of this Court is invoked under 28 USC 1257(3).

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1 *Appendix A*, infra, p. App. 1.

2 Section 1, Amendment XIV, Constitution of the United States. Cf. Section 6, Article 1, Constitution of the State of Wyoming.

3 *Appendix A*, infra, p. App. 2. But see specially concurring opinions of Justices Urbigkit and Thomas.

4 *Ward v. Love County*, 253 U.S. 17, 22-23 (1920), citing *U.P.R.R. Co. v. P.S.C.*, 248 U.S. 67; Leathe v. Thomas, 207 U.S. 93, 99; *Vandalia R.R. Co. v. South Bend*, 207 U.S. 359, 367; *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261; *Enterprise Irriga-*

(Continued on following page)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1 of Amendment XIV of the Constitution of the United States provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 6 of Article 1 of the Constitution of the State of Wyoming provides:

> "No person shall be deprived of life, liberty or property without due process of law."

3. The following Statutes of the State of Wyoming are also involved:

> *36-2-107.* The board (of land commissioners) shall have the power and authority to promulgate and adopt rules and regulations not inconsistent with the laws of the state, as it may from time to time deem necessary in the direction, control, disposition and care of all state lands.

(Continued from previous page)

tion District v. Farmers Mutual Canal Co., 243 U.S. 157, 164; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 443; *Huntington v. Atrill*, 146 U.S. 657, 683-684; *Boyd v. Thayer*, 143 U.S. 135, 180; *Carter v. Texas*, 177 U.S. 442, 447; *T.H. & I. R.R. Co. v. Indiana*, 194 U.S. 579, 580. "With this qualification, it is true that a judgment of a state court, which is put as independent non-federal grounds broad enough to sustain it, cannot be reviewed by (the Court). But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Ibid.*

36-5-109. All rentals accruing to the state . . . shall become due and payable at the office of the commissioner ninety (90) days preceding the first day of the rental year to which such rental applies, and if not paid within thirty (30) days notice by registered mail, addressed to the last post-office address recorded with the commissioner, to the effect "that in the event said rental is not paid on or before the last day of the current year, the lease shall automatically become cancelled and terminated and all rights of the lessee thereunder shall cease without further notice," and if such rental is not paid within the time specified the lease shall automatically become cancelled and terminated, and the commissioner shall as soon as possible thereafter, advertise the lands in the county where located, as vacant and subject to lease.

16-3-110. A final decision or order adverse to a party in a contested case shall be in writing or dictated into the record. The final decision shall include findings of fact and conclusions of law separately stated. Findings of fact if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supported by the findings. Parties shall be notified either personally or by mail of any decision or order. A copy of the decision and order shall be delivered or mailed forthwith to each party or to his attorney of record.

4. Rule 12.04 of the Wyoming Rules of Appellate Procedure is also involved:

Rule 12.04. In a contested case, or in a non-contested case where a statute places a time limit on appeal, the petition for review shall be filed within thirty (30) days after written certified notice to all parties of the final decision of the agency or denial of the petition for a rehearing, or, if a rehearing is held, within thirty

(30) days after written, certified notice to all parties of the decision thereon. . . .

5. Section 21 of the Rules and Regulations governing Leasing of Sub-surface Resources (effective March 1, 1982) of the State of Wyoming Board of Land Commissioners is also involved.

> Section 21. *Cancellation for Default.* If the lessee defaults in the performance or observance of any of the rules or any of the terms, covenants or conditions of the lease under which it is operating, the Board of Land Commissioners may serve or cause notice to be served of such failure or default either by personal service or by certified or registered mail upon the lessee and if such failure or default continues for a period of thirty (30) days after the service of such notice, may at its option declare a forfeiture and cancel the lease, whereupon all rights and privileges obtained by the lessee thereunder shall terminate and cease and the lessor may re-enter and take possession of the premises.

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STATEMENT OF THE CASE

On January 2, 1983, the State of Wyoming granted Mrs. Moira Scanlon the "exclusive right to drill for . . . and dispose of all the oil (and) gas . . . produced" from 1279.48 acres of State-owned land in Sheridan County, Wyoming.[5] On January 15, 1987, an "intermediate state employee" returned Mrs. Scanlon's payment of the lease

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[5] Lease No. 83-00040, parcel 699, *State of Wyoming Oil and Gas Lease*.

payments due on January 2, 1986, and January 2, 1987. Mrs. Scanlon was advised that her lease "was terminated February 21, 1986 for failure to pay rental when due."

On February 5, 1987, Mrs. Scanlon's attorney requested the Commissioner to reconsider the decision of the intermediate employee. On February 12, the Commissioner's attorney responded, saying that Mrs. Scanlon's lease would not be reinstated. On February 18, Mrs. Scanlon's attorney replied, restating a telephone conversation of February 17:[6]

> "It is my understanding that your letter . . . constitutes (the Commissioner's) final decision. Mrs. Scanlon has now exhausted her administrative remedies, and whether or not her lease should be reinstated is now ripe for review.
>
> "If I have misstated your understanding, please let me know."

The Commissioner's attorney did not respond.

On March 10, 1987, Mrs. Scanlon petitioned the Wyoming District Court to review the Commissioner's refusal to accept her lease payments. She first alleged:

> "33. The refusal of the Commissioner to accept Mrs. Scanlon's rental payment is arbitrary and capricious and constitutes an abuse of discretion as a matter of law, in that the Commissioner has not adhered to his own regulations or the Wyoming Statutes."
>
> "34. The rights held by Mrs. Scanlon under Lease 83-00040 are property rights, and the arbitrary and capricious action of the Commissioner is cancell-

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[6] Appendix A, *infra*, p. App. 6.

ing that lease is a forfeiture of Mrs. Scanlon's rights, contrary to law.'"[7]

On May 13, 1987, Mrs. Scanlon filed her "First Amendment to Petition to Review." She alleged:

> "37. The Commissioner's cancellation of lease 83-00040 has deprived Mrs. Scanlon of her property without due process of law or just compensation in derogation of section 6 of Article 1 of the Wyoming Constitution and section 1 of the Fourteenth Amendment of the United States Constitution."

She asked the court to "declare" and "decree" that:

> "(2) in cancelling lease 83-00040 the Commissioner deprived Mrs. Scanlon of her property without due process of law or just compensation, in violation of the Constitution of State of Wyoming and the United States."

On June 5, 1987, Mrs. Scanlon and the Commissioner filed a Joint Motion for Certification to the Wyoming Supreme Court, stating:

> "This case is appropriate for direct Supreme Court review because it involves only legal questions, to wit, the interpretation to Rule 12.04 W.R.A.P., Sections 9 and 21 of the Rules and Regulations of the Board of Land Commissioners Governing Leasing of Subsurface Resources, Sections 36-2-101 through 36-2-210, 36-5-101 through 36-5-116 of the Wyoming Statutes, Section 6 of Article 1 of the Wyoming Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution."

On June 8, 1987, Amoco Production Company filed a Stipulated Motion to Intervene as a Defendant. The motion was granted on the same day, and Amoco joined in

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[7] Paragraphs 33 and 34, *Petition to Review*.

the Motion for Certification. On June 12, 1987, the District Court certified the case to the Wyoming Supreme Court.

Mrs. Scanlon presented the following issues to the Wyoming Supreme Court:

> I. Whether Mrs. Scanlon's exclusive right to remove subsurface resources is a property right.
>
> II. Whether the Commissioner of Public Lands must abide by his regulations in dealing with Mrs. Scanlon's exclusive right to remove subsurface resources.
>
> III. Whether a "Message" on a Form solociting a "Reply" constitutes "A final decision of an agency in a contested case."

The Court found it was:

> "not necessary to address these issues because there are determinative jurisdictional defects. . . . The January 15, 1987, notice to Mrs. Scanlon advised her of a final decision by an agency which adversely affected her rights. The correspondence between the Attorney General's office and Mrs. Scanlon's attorney had no bearing on the finality of the agency's decision and did not serve to toll the thirty-day period of time in which to file her petition for review. Although Mrs. Scanlon may have had meritorious issues for review, her failure to file her petition for such review within thirty days after receiving notice divested the district court of jurisdiction.
>
> * * *
>
> We hold that the district court lacked jurisdiction to proceed with this cause, and such lack of jurisdiction by the district court undermines the jurisdiction of this Court."

Justice Urbigkit filed a "special concurrence," stating:

"Although I could find a substantive basis to affirm the decision of the land office for lease cancellation and also sustain the decision on procedural justification derived from non-exhausting administratve remedies, I do not find a final order was ever entered initiating judicial-review time limitations.[1]

In equal substance and significance to the inquiry whether a final order was entered involving this administratively defined state agency under the general jurisdiction of the administrative division of state government, is the question whether a sufficient exhaustion of administrative remedies occurred so that appeal to the courts was authorized at this juncture. A not dissimilar concern could be envisioned as to who makes final decisions for the highway commission, the state game and fish commission, the environmental quality council, within the office of the Governor, or for that matter, a law clerk as an adjunct to the Wyoming Supreme Court accommodating a desired activity within the judicial branch of state government. Does a district highway engineer, a game warden a field supervisor, or some other agency employee take final action upon which, without resort to the agency's superintending or supervisory authority, judicial review becomes justified?

Under footnote 1, Justice Urbigkit continued:

"I am concerned with the apparent determination that an intermediate state employee can, by speed memo, take "final agency action" without demonstrated authority, and that this action is apparently now considered to be action of the designated administrator of the government agency, the State Land Commissioner, even though noticed in a form that lacks compliance with the requirement of Rule 12.04, W.R.A.P.:

> " * * * within thirty (30) days after written, *certified notice to all parties of the final decision of the agency* or denial of the petition for rehearing, or, if a rehearing is held, within thirty (30) days

> after written, *certifed notice to all parties of the decision thereon*, except that upon a showing of excusable neglect based upon the failure of a party to learn of the decision or the action, the district court may extend the time for filing the petition for review not exceeding thirty (30) days from the expiration of the original time herein prescribed. * * *" (Emphasis in original.)

It is unquestioned that no certified notice authored by whomever was ever sent, since the medium of communication was a speed memo sent by ordinary mail returning the tendered check. Real problems may arise in Wyoming administrative agency operations if intermediate-level employees are generally entrusted with formal agency-action authorization to make the "final decision" upon which judicial review is based. As a quick example, it is possible that this decision might extinguish the right of the agency head to make the final decision as then considered to be something in the nature of a rehearing, which might be subject to operational rules for authorization. The subject could be belabored in both operational practice and legal rules of authority degelation, but suffice it to say that this record simply lacks justification for designation of the returned check memo as of itself being final agency action. Furthermore, extraction of the certified mail requirements is unjustified and unexplained."

Rehearing was denied on September 20, 1988.

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STATEMENT OF FACTS

On December 22, 1982, Mrs. Scanlon was the successful applicant to lease 1279.48 acres of State land in Sheridan County, Wyoming. The terms of her lease provided:

> "Annual rentals . . . shall be made payable in advance for the first year and each year thereafter. No notice of rental due shall be sent to the lessee. If the rental is not paid on or before the date it becomes due, notice of default will be sent to the lessee and a penalty of $.50 per acre for late payment will be assessed.
>
> "The lessee is not legally obligated to pay either the rental or the penalty, but if the rental and penalty are not paid within thirty (30) days after the notice of default has been received the lease will terminate automatically by operation of law."[8]

On January 5, 1985, Mrs. Scanlon mailed a check for $1,280.00 to the Commissioner to pay the rental due January 2, 1985. On January 7, 1985, the Commissioner notified Mrs. Scanlon that the rental payment of $1,280.00 due January 2, 1985, had not been received by its due date. The letter stated:

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[8] *Oil and Gas Lease Form Terms:* Section 1(c). The Commissioner's *Rules and Regulation governing leasing of Sub Surface Resources* (effective March 1, 1982) states: *"Section 21. Cancellation for Default.* If the lessee defaults in the performance or observance of any of the rules or any of the terms . . . of the lease . . ., the board of Land Commissioners may serve or cause notice to be served of such failure or default either by personal service or registered mail upon the lessee and, if such failure or default continues for a period of thirty (30) days after the service of such notice, may at its option declare a forfeiture and cancel the lease, whereupon all rights and privileges obtained by the lessee thereunder shall terminate and close and lessor may re-enter and take possession of the premises."

> "If your rental and penalty payment in the amount of $1,920.00 is not received in this office within 30 days from receipt of this notice your lease will be terminated by operation of law."[9]

On February 4, 1985, Mrs. Scanlon mailed another check, this one to pay the $640.00 penalty. On February 8, 1985 the Commissioner deposited both of Mrs. Scanlon's checks. Sometime later, both checks were returned by the bank to the Commissioner with the notation "Insufficient Funds".

On September 17, 1985, Mrs. Scanlon sent the Commissioner a cashier's check for $1,920.00 and redeemed the two checks. According to the Commissioner, Mrs. Scanlon's lease terminated 30 days after Mrs. Scanlon received the Januray 7, 1985 notice, but was reinstated on September 17, 1985, when the agency accepted her late rental payment. Under that reinstatement, Mrs. Scanlon's lease shauld have been extended until August 13, 1986. (Well past January 2).[10]

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9 *Letter: Howard M. Schrinar, Commissioner, to Moira Scanlon,* dated January 7, 1985. The payment due January 2, 1984, had been received on January 3, 1984, but no penalty had been imposed.

10 *Brief of Respondent Howard Schrinar, Scanlon v. Schrinar,* p. 3, *Appendix A, infra.* Mrs. Scanlon's lease requires an *annual* rental of $1.00 per acre or fraction thereof. If, as the Commissioner states, "Mrs. Scanlon's lease terminated 30 days after Mrs. Scanlon received the January 7, 1985, notice," (assuming a three day delivery period) she should have received it on January 10, 1985. According to the Commissioner's rationale, the lease terminated on February 9, 1985—35 days into the *annual* term. When, on September 17, 1985, he "reinstated" the annual lease, he should have granted Mrs. Scanlon exclusive rights for the remaining 330 days, or until August 13, 1986.

On January 21, 1986, the Commissioner again wrote Mrs. Scanlon, saying (in part):

> "Payment of advance rental in the amount of $1,920.00 on lease No. 83-00040 was not received in this office prior to the due date of *January 2, 1985.* * * * If your rental and penalty payment in the amount of $1,920.00 is not received in this office *within 30 days from receipt of this notice,* your lease will be terminated by operation of law."[11]

Mrs. Scanlon did not receive that letter. It was dated January 21, 1986, and was postmarked on January 23, 1986. The Commissioner's files note that the Post Office attempted to deliver it on January 25 and January 30 and returned it to the Commissioner on February 10, 1986.

During the times the post office records indicate attempted deliveries, Mrs. Scanlon was away from home. Her son picked up her mail, reviewed its contents, and contacted Mrs. Scanlon about any matters that needed attention. Mrs. Scanlon has stated that the notices of attempts to deliver the Notice of Default were never received at her address.

On February 21, 1986, 29 days after the Commissioner mailed the Notice of Default, 27 days after the Post Office records say delivery was first attempted, and 21 days after delivery was last attempted, the Commissioner cancelled Mrs. Scanlon's lease 83-00040.[12] The Commissioner

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[11] Emphasis added. The lease payment due on January 2, 1985, had been finally paid on September 17, 1985.

[12] Under his own regulations, the Commissioner was not to terminate the lease until *30 days* after Mrs. Scanlon *received* the notice.

has never sent Mrs. Scanlon a notice that the lease payment due on January 2, 1986, was in default.

On January 10, 1987, Mrs. Scanlon sent the Commissioner a certified check for $3,840.00 to make the rental and penalty payments due on January 2, 1986, and January 2, 1987.[13]

On January 15, 1987, one of the Commissioner's staff returned the check to Mrs. Scanlon with the following message:

State of Wyoming

COMMISSIONER OF PUBLIC LANDS AND FARM LOANS

122 West 25th St. Herschler Bldg.
Cheyenne, Wyoming 82002-0600

MESSAGE	REPLY
Moira Scanlon 32 Seaver St. East Taunton, MA 02718 January 15, 1987 We are returning your official bank check No. 177545, dated Jan. 10, 1987 in the amount of $3,840.00 which was sent to this office to pay rental for lease #83-0040. Please be advised that this lease was terminated Feb. 21, 1986 for failure to pay rental when due. We are enclosing copy of default letter and copy of envelope in which we tried to deliver letter.	] Date]
/s/ Terrie Sais	Signed

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[13] Under the Commissioner's Statement of Facts, those payments were not due until August 13, 1986, and August 13, 1987, respectively.

On February 5, 1987, Mrs. Scanlon, through her attorney, resubmitted the check and requested that the Commissioner reconsider his decision to terminate the lease. He asked the Commissioner to reinstate the lease because Mrs. Scanlon had never received the required pre-termination notice.

The Attorney General's office returned the check, stating:

"The lease will not be reinstated."[14]

On February 18, 1987, Mrs. Scanlon's attorney wrote the Attorney General's office:

> "It is my understanding that your letter of February 12, 1987, on behalf of your client, Public Lands Commissioner, Howard M. Schrinar, constitutes his final decision. Mrs. Scanlon has now exhausted her administrative remedies, and whether or not her lease should be reinstated is now ripe for review in the District Courts of Wyoming. If I have misstated your understanding, please, let me know."

No response was received to this letter. On March 10, 1987, Mrs. Scanlon filed a Petition for Review with the District Court, which was certified to the Wyoming Supreme Court. On August 17, 1988, that Court dismissed the Petition, holding that "the District Court lacked jurisdiction to proceed with the cause, and such lack of jurisdiction by the district court undermines the jurisdiction of this Court."

Mrs. Scanlon requested reconsideration, which was denied.

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41 *Op cit, supra* page App. 5.

STATEMENT OF REASONS

A VERY DIFFICULT GAME INDEED[15]

Mankind's long struggle for freedom was marked with success only after he found a harness for the power of government. In the Unilted States, the harness is a written Constitution by which the people are the masters of government rather than its slaves. "We, the people," included limitations upon the powers of government in that

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15 "Get to your places!" shouted the Queen in a voice of thunder, and people began running about in all directions, tumbling up against each other: however, they got settled down in a minute or two, and the game began.

* * *

The chief difficulty Alice found at first was in managing her flamingo: she succeeded in getting its body tucked away, comfortably enough, under her arm, with its legs hanging down, but generally, just as she had got its neck nicely straightened out, and was going to give the hedgehog a blow with its head, it would twist itself round and look up onto her face, with such a puzzled expression that she could not help bursting out laughing; and, when she had got his head down and was going to begin again, it was very provoking to find that the hedgehog had unrolled itself, and was in the act of crawling away: besides all this, there was generally a ridge or furrow in the way wherever she wanted to send the hedgehog to, and, as the doubled-up soldiers were always getting up and walking off to other parts of the ground, Alice soon came to the conclusion that it was a very difficult game indeed.

The players all played at once without waiting for turns, quarrelling all the while, and fighting for hedgehogs; and in a very short time the Queen was in a furious passion, and went stamping about, and shouting "Off with his head!" or "Off with her head!" about once in a minute.

Alice began to feel very uneasy: to be sure, she had not as yet had any dispute with the Queen, but she knew that it might happen any minute, "and then," thought she, "what would become of me? The great wonder is, that there's any one left alive!" Carroll, *Alice's Adventures in Wonderland*, pp. 79, 80. A Signet Classic, New York (1960).

Constitution. Among those limitations is the basic tenet that our State and federal governments must observe those limitations when dealing with "We, the people . . ."

The complexities of today's living perhaps require governmental intrusion into most aspects of our lives, but, if such intrusions are necessary, they should be in accordance with established laws and regulations. If government can ignore its own established rules in dealing with "We, the people," the confidence of the people in their government is threatened, and we are faced with "a very difficult game indeed," and law is no longer ruler and yields to the man or group of men who can thus alter the instrument made by "We, the people . . ."[16]

In 1959, Mr. Justice Frankfurter strongly asserted:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if (an action) is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."[17]

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16 Virginia Commission on Constitutional Government. *The Reconstruction Amendments' Debates*, Preface. Virginia (1967).

17 *Vitarelli v. Seaton*, 359 U.S. 535, 546-47 (1959), citing *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87-88, and *Service v. Dulles*, 354 U.S. 363, cf., *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) in which the Attorney General may have prejudiced the decision of the Board of Immigration Appeals by publishing a list of undesirable aliens. The court held: " . . . (a)s long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

Even the President of the United States was required to comply with regulations promulgated by the Attorney General he appointed. During the Watergate investigation, the Attorney General delegated "plenary authority" to a Special Prosecutor "to control the course of investigations and litigation . . . involving the President, members of the White House staff, or Presidential appointees." When the Special Prosecutor subpoenaed tape recordings and documents from the President, this Court required the President to produce the tapes, stating:

> "The Attorney General has delegated the authority to represent the United States . . . to a Special Prosecutor with unique authority and tenure . . . So long as this regulation is extant it has the force of law. * * *
>
> . . . (I)t is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as the regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it."[18]

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[18] *United States v. Nixon*, 418 U.S. 683, 695-696 (1974). Cf., *Service v. Dulles*, 354 U.S. 363, 386 (1957): ". . . (T)he regulations left the Secretary *functus officis* with respect to such cases once the Deputy Under Secretary had made determination favorable to the employee. So here when (he) approved the . . . Board's action . . . clearing the Petitioner, under these regulations the case against Service was closed. Hence Service's subsequent discharge by the Secretary must be deemed to have been in contravention of the . . . Regulations."

THE WYOMING SUPREME COURT'S DECISION IS NOT BASED ON "ADEQUATE NON-FEDERAL GROUNDS"

This Court has firmly established that an agency of the federal government must abide by its own rules in dealing with members of the public. The Supreme Court of Wyoming has refused to determine if the Wyoming Commissioner of Public Lands must also abide by his own rules.

To support their refusal they determined that a "speed memo" was a "final agency action" even though the "speed memo" was from an "intermediate" employee and was not "certified" in accordance with Wyoming's Rules of Appellate Procedure.[19] The question then becomes: Did this dismissal, supposedly based upon "state procedural grounds" rest "upon an *adequate* nonfederal basis . . . in the circumstances of this case.":[20]

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

As stated by Mr. Justice Holmes:[21]

> "The state courts may deal with (procedure) as they think proper in local matters but they cannot treat it

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19 Appendix A, Infra p. App. 10.

20 *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958), quoting *First National Bank v. Anderson*, 269 U.S. 341, 346.

21 *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) citations omitted.

as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. This is famliar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way."

THE FEDERAL QUESTION WAS RAISED IN THE DISTRICT COURT

The "federal question" raised by Mrs. Scanlon was first presented to the District Court of the First District of Wyoming in paragraph 37 of her First Amendment to Petition to Review:

> "37. The Commissioner's cancellation of lease 83-00040 has deprived Mrs. Scanlon of her property without due process of law or just compensation in deragation of section 6 of Article 1 of the Wyoming Constitution and section 1 of the Fourteenth Amendment of the United States Constitution."

When the parties moved for Certification to the Wyoming Supreme Court, they stated certification was "appropriate" because it involved "the interpretation . . . of . . . Section 1 of the Fourteenth Amendment to the United States Constitution."

———o———

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Telephone (307) 635-3095

Attorney for Petitioner

APPENDIX A

Moira Q. SCANLON, Petitioner,

v.

Howard M. SCHRINAR, Commissioner of Public Lands, and Amoco Production Company, Respondents.

No. 87-145.

Supreme Court of Wyoming.

Aug. 17, 1988.

Holder of oil lease had lease rights terminated for failure to pay advance rental and sought review of claim in district court. The District Court, Laramie County, Joseph F. Maier, J., certified the case for review by Supreme Court. The Supreme Court, Macy, J., held that lessee's failure to timely file petition for review divested district court of jursdicton.

Dismissed.

Thomas, J., concurred specially and filed opinion.

Urbigkit, J., concurred specially and filed opinion in which Thomas, J., joined.

Thomas E. Cahill, Cheyenne, for petitioner.

Joseph B. Meyer, Atty. Gen., and Clinton D. Beaver, Asst. Atty. Gen., for respondent Howard M. Schrinar, Com'r of Public Lands.

Jack D. Palma, II, Edward W. Harris, and William L. Combs of Holland & Hart, Cheyenne, for respondent Amoco Production Co.

Before THOMAS, URBIGKIT, and MACY, JJ., KAIL, District Judge, and JOFFE, Retired District Judge.

MACY, Justice.

Moira Q. Scanlon petitioned the district court for judicial review of the decsion of the Commissioner of Public Lands to terminate her oil and gas lease. The case was then certified to this Court, and we are presented with the following issues by Mrs. Scanlon:

> I. WHETHER MRS. SCANLON'S EXCLUSIVE RIGHT TO REMOVE SUBSURFACE RESOURCES IS A PROPERTY RIGHT.
>
> II. WHETHER THE COMMISSIONER OF PUBLIC LANDS MUST ABIDE BY HIS OWN REGULATIONS IN DEALING WITH MRS. SCANLON'S EXCLUSIVE RIGHT TO REMOVE SUBSURFACE RESOURCES.
>
> III. WHETHER A "MESSAGE" ON A FORM SOLICITING A "REPLY" CONSTITUTES A "FINAL DECISION OF AN AGENCY IN A CONTESTED CASE."

It is not necessary to address these issues because there are determinative jurisdictional defects.

We dismiss.

On December 22, 1982, Mrs. Scanlon was the successful applicant in the simultaneous oil and gas lease drawing held for the right to lease Parcel No. 699.[1] As a result, Mrs. Scanlon and the Board of Land Commissioners en-

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1. Parcel No. 699 is legally described as follows: N½; E½ SW¼; SE¼ of Section 16, T. 55 N., R. 81 W., 6th P.M. (560 acres); SE¼ SW¼: SW¼ SE¼ of Section 17, T. 55 N., R. 81 W., 6th P.M. (80 acres); and all of Section 30, T. 55 N., R. 81 W., 6th P.M. (639.48 acres).

tered into a lease agreement, Lease No. 83-00040, which provided in applicable part:

> Annual rentals on all leaves shall be payable in advance for the first year and each year thereafter. No notice of rental due shall be sent to the lessee. If the rental is not paid on or before the date it becomes due, notice of default will be sent to the lessee, and a penalty of $0.50 per acre for late payment will be assessed.
>
> The lessee is not legally obligated to pay either the rental or the penalty, but if the rental and penalty are not paid within thirty (30) days after the notice of default has been received, the lease will terminate automatically by operation of law. Termination of the lease shall not relieve the lessee of any obligation incurred under the lease other than the obligation to pay rental or penalty. The lessee shall not be entitled to a credit on royalty due for any penalty paid for late payment of rental on an operating lease.[2]

On January 21, 1986, the Commissioner of Public Lands sent the following letter by certified mail, return receipt requested, to Mrs. Scanlon:

> Payment of advance rental in the amount of $1280.00 on lease No. 83-00040 was not received in this office prior to the due date of January 2, 1985.
>
> In accordance with a new rule approved by the Board of Land Commissioners and effective September 29, 1981, you may retain this lease in good standing if you wish to pay the rental of $1.00 per acre plus 50¢ per acre penalty for late payment.

---

2. We note that the default provisions contained in Section 9 of the Rules and Regulations Governing Leasing of Sub-Surface Resources for the State of Wyoming Board of Land Commissioners and Wyoming Farm Loan Board, effective March 1, 1982, are identical to these lease provisions.

> If your rental and penalty payment in the amount of $1920.00 is not received in this office within 30 days from receipt of this notice, your lease will be terminated by operation of law.

The post office attempted to deliver this letter on January 25 and 30, 1986, with no success and returned it to the Commissioner of Public Lands on February 10, 1986.

The Commissioner of Public Lands received Mrs. Scanlon's certified check dated January 10, 1987, in the amount of $3,840 for rental payments due on January 2, 1986, and January 2, 1987, plus penalty payments incurred on the lease. On January 15, 1987, that check was returned to Mrs. Scanlon with a notice stating:

> We are returning your official bank check No. 177545 dated Jan. 10, 1987 in the amount of $3,840.00 which was sent to this office to pay rental for lease # 83-[0]0040. Please be advised that this lease was terminated Feb. 21, 1986 for failure to pay rental when due. We are enclosing [a] copy of [the] default letter and [a] copy of [the] envelope in which we tried to deliver [the] letter.[3]

On February 5, 1987, Mrs. Scanlon, through her attorney, resubmitted the check and requested reconsideration of the decision to terminate her lease because she had never received the required pretermination notice. The Attorney General's office, on behalf of the Commissioner of Public Lands, responded on February 12, 1987, stating:

> I am responding on behalf of my client, Howard Mr. Schrinar, to your letter of February 5, 1987, concerning the cancellation of State Lease 83-00040.

---

3. The copy of the letter mentioned herein is apparently the certified letter sent by the Commissioner of Public Lands to Mrs. Scanlon on January 21, 1986.

> It is our position that the lease terminated automatically by operation of law as per the terms of the lease and Section 9 of the Rules and Regulations Governing Leasing of Subsurface Resources. Under these provisions, the lease was not "cancelled" on February 21, 1986, by any action taken by the Board of Land Commissioners or its staff. The lease terminated automatically 30 days after receipt of the notice of rental default. It is our position that a lessee has constructively received a notice on the date the United States Postal Services makes its last attempt to deliver a certified letter.
>
> Because Mrs. Scanlon did not attempt to cure her default in paying rentals until nearly one year after the rental default notice was constructively received, she can hardly claim a right to cure the default. Enclosed is Mrs. Scanlon's check for $3,840.00 which I am returning to you. The lease will not be reinstated.

On February 18, 1987, Mrs. Scanlon's attorney replied to the letter from the Attorney General's office, stating in applicable part:

> It is my understanding that your letter of February 12, 1987, on behalf of your client, Public Lands Commissioner, Howard M. Schrinar, constitutes his final decision. Mrs. Scanlon has now exhausted her administrative remedies, and whether or not her lease should be reinstated is now ripe for review in the District Courts of Wyoming.
>
> If I have misstated your understanding, please let me know.

The Attorney General's office did not answer this letter. On March 10, 1987, Mrs. Scanlon filed a petition for review in the district court.

The Commissioner of Public Lands filed a motion to dismiss with a supporting brief, and Mrs. Scanlon replied

with her own brief in opposition. On June 5, 1987, a "Joint Motion for Certification to the Supreme Court" was filed by the parties. The district court, after allowing Amoco Production Company to intervene as a defendant/respondent to the action and after Amoco Production Company had consented to the motion for certification to the Supreme Court, certified this case for review by this Court.

Mrs. Scanlon argues that the notice dated January 15, 1987, informed her of the termination of her oil and gas lease but could not be considered as a final decision of an agency which was ripe for judicial review until after she had received the letter from the Attorney General's office dated February 12, 1987, or until after some time had elapsed following her letter to the Attorney General's office dated February 18, 1987, asking if such determination to terminate her lease was a final decision. We cannot agree.

Judicial review of an administrative action is governed by Rule 12 of the Wyoming Rules of Appellate Procedure. W.R.A.P. 12.01 provides:

> To the extent that judicial review of administrative action by a district court is available, any person who is aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or who is aggrieved or adversely affected in fact by any other agency affected in fact by a rule adopted by [an] agency, may obtain such review as provided in this rule.

W.R.A.P. 12.04 provides in pertinent part:

> In a contested case, or in a noncontested case where a statute places a time limit on appeal, the

> petition for review shall be filed within thirty (30) days after written, certified notice to all parties of the final decision of the agency or denial of the petition for a rehearing, or, if a rehearing is held, within thirty (30) days after written, certified notice to all parties of the decision thereon, except that upon a showing of excusable neglect based upon the failure of a party to learn of the decision or action, the district court may extend the time for filing the petition for review not exceeding thirty (30) days from the expiration of the original time herein prescribed.[4]

The January 15, 1987, notice to Mrs. Scanlon advised her of a final decision by an agency which adversely affected her rights.[5] The correspondence between the Attorney General's office and Mrs. Scanlon's attorney had no bearing on the finality of the agency's decision and did not serve to toll the thirty-day period of time in which to file her petition for review.[6] Although Mrs. Scan-

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4. Such review is available by statute. W.S. 16-3-114(a) provides in applicable part:

> Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review * * *. The procedure to be followed in the proceeding * * * shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming supreme court.

5. This becomes particularly apparent when it is recognized that on August 2, 1986, the Board of Land Commissioners entered into a lease agreement with Amoco Production Company for a portion of the land formerly leased by Mrs. Scanlon.

6. If the soliciting of reconsideration or clarification of agency action were permitted, the limit on the time to file a petition for judicial review would be rendered meaningless.

lon may have had meritorious issues for review, her failure to file her petition for such review within thirty days after receiving notice divested the district court of jurisdiction.

In the case of *Stagner v. Wyoming State Tax Commision,* 642 P.2d 1296, 1297-98 (Wyo.1982), we stated that untimely filing is a ground for dismissal of a petition for review:

> Timely filing of a petition for review is mandatory and jurisdictional.
>
> * * * * * *
>
> * * * [I]t must be within thirty days of such action or of notice of such action or of the time the person becomes aggrieved or adversely affected by such action, whichever is latest. A petition for judicial review may be timely if filed within thirty days after a rule or agency action or inaction adversely affects the person although the action, inaction, or adoption of the rule may have occurred long before that time. Likewise, a petition for review may be timely if filed within thirty days after receiving notice thereof although the action, inaction, or adoption of the rule may have occurred long before that time. In a contested case, the required notice of the decision will normally start the running of the thirty-day period.
>
> > "The law is almost elementary that whatever puts a party on inquiry amounts to 'notice.'" *Rodin v. State* [*ex rel. City of Cheyenne*], Wyo., 417 P.2d 180, 195 (1966).

(Citations omitted.) See also *Employment Security Commission of Wyoming v. Young,* 713 P.2d 198 (Wyo.1986).

We also stated:

> This court can have no greater jurisdiction of the subject matter than the trial court and where the trial court had no jurisdiction in an administrative appeal from an agency, this court must dismiss the appeal.

Snell v. Ruppert, 541 P.2d 1042, 1048 (Wyo.1975), quoted in *Joelson v. City of Casper, Wyoming*, 676 P.2d 570, 572 (Wyo.1985).

We hold that the district court lacked jurisdiction to proceed with this cause, and such lack of jurisdiction by the district court undermines the jurisdiction of this Court.

Dismissed.

THOMAS, J., files a specially concurring opiinon.

URBIGKIT, J., files a specially concurring opinion in which THOMAS, J., joins.

THOMAS, Justice, specially concurring.

In my view, Justice Urbigkit has captured the appropriate rationale for dismissal of this appeal. Consequently, I join in his concurring opinion, but I think it is appropriate to add the following comment of my own.

In *Brasel & Sims Construction Company, Inc. v. State Highway Commission of Wyoming*, Wyo., 655 P.2d 265 (1982), this court held that an administrative body does not have authority to adjudicate contract disputes involving contracts to which it is a party, unless that authority specifically has been granted. See also *State Highway Commission of Wyoming v. Brasel & Sims Construction Company, Inc.*, Wyo., 688 P.2d 871 (1984), and *Rissler & McMurry Company, Inc. v. Wyoming Highway Department*, Wyo., 582 P.2d 588 (1978) (Justice Raper and Justice

Thomas dissenting). In addition to the views of Justice Urbigkit, I suggest that the statute in this instance does not appear to afford the Board of Land Commissioners the authority to adjudicate disputes arising out of its leases.

URBIGKIT, Justice, specially concurring, with whom THOMAS, J. joins.

Although I could find a substantive basis to affirm the decision of the land office for lease cancellation and also sustain the decision on procedural justification derived from non-exhausting administrative remedies, I do not find a final order was ever entered initiating judicial-review time limitations.[1]

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1. I am concerned with the apparent determination that an intermediate state employee can, by speed memo, take "final agency action" without demonstrated authority, and that this action is apparently now considered to be action of the designated administrator of the government agency, the State Land Commissioner, even though noticed in a form that lacks compliance with the requirement of Rule 12.04, W.R.A.P.:

> " * * * within thirty (30) days after written, *certified notice to all parties of the final decision of the agency* or denial of the petition for rehearing, or, if a rehearing is held, within thirty (30) days after written, *certified notice to all parties of the decision thereon,* except that upon a showing of excusable neglect based upon the failure of a party to learn of the decision or the action, the district court may extend the time for filing the petition for expiration of the original time herein prescribed. * * * " (Emphasis added.)

It is unquestioned that no certified notice authored by whomever was ever sent, since the medium of communication was a speed memo sent by ordinary mail returning the tendered check. Real problems may arise in Wyoming administrative agency operations if intermediate-level emplov-

(Continued on following page)

In equal substance and significance to the inquiry whether a final order was entered involving this administratively defined state agency under the general jurisdiction of the administrative division of state government, is the question whether a sufficient exhaustion of administrative remedies occurred so that appeal to the courts was authorized at this juncture. A not dissimilar concern could be envisioned as to who makes final decisions for the highway commission, the state game and fish commission, the environmental quality council, within the office of the Governor, or for that matter, a law clerk as an adjunct to the Wyoming Supreme Court, accommodating a desired activity within the judicial branch of state government. Does a district highway engineer, a game warden, a field supervisor, or some other agency employee take final action upon which, without resort to the agency's superintending or supervisory authority, judicial review becomes justified?

For this activity and agency, Wyo. Const. art. 18, § 3 provides:

(Continued from previous page)

ees are generally entrusted with formal agency-action authorization to make the "final decision" upon which judicial review is based. As a quick example, it is possible that this decision might extinguish the right of the agency head to make the final decision as then considered to be something in the nature of a rehearing, which might be subject to operational rules for authorization. The subject could be belabored in both operational practice and legal rules of authority delegation, but suffice it to say that this record simply lacks justification for designation of the returned check memo as of itself being final agency action. Furthermore, extraction of the certified mail requirement is unjustified and unexplained.

> "The governor, secretary of state, state treasurer, state auditor and superintendent of public instruction shall constitute a board of land commissioners, which under direction of the legislature as limited by this constitution, shall have direction, control, leasing and disposal of lands of the state granted, or which may be hereafter granted for the support and benefit of public schools, subject to the further limitations that the sale of all lands shall be at public auction, after such delay (not less than the time fixed by congress) in portions at proper intervals of time, and at such minimum prices (not less than the minimum fixed by congress) as to realize the largest possible proceeds. And said board, subject to the limitations of this constitution and under such regulations as may be provided by law shall have the direction, control, disposition and care of all lands that have been heretofore or may hereafter be granted to the state."

The complementary statute provides:

> "The governor, secretary of state, state treasurer, state auditor, and superintendent of public instruction, being constituted a 'board of land commissioners' by the provisions of section 3, article 18, of the constitution of the state of Wyoming, shall as such board, have the direction, control, leasing, care and disposal of all lands heretofore or hereafter granted or acquired by the state for the benefit and support of public schools or for other purpose whatsoever, subject to the limitations contained in the constitution of the state, and the laws enacted by the legislature. The board shall have the power and authority to take such official action as may be necessary in securing title to land grants, or any other lands acquired by the state." Section 36-2-101, W.S.1977.

In effectuation of that responsibility, the state land office, as an agency under the general administrative jur-

isdiction of the Governor of the State of Wyoming, was created.[2] The duties of the commissioner of public lands are specified as:

> "The commissioner of public lands shall keep the records of the board of land commissioners, and be the secretary thereof. He shall make out and countersign all patents, contracts or other instruments issued by him to purchasers and others, and make out and sign all leases. He shall keep a record of all such leases, patents or other instruments in books or other records. He shall file and preserve in his office all bonds, contracts, leases, and other instruments given by lessees, purchasers and others. He shall have the custody of the seal of the board, and shall keep the minutes of the proceedings thereof, and shall perform such other duties concerning the business transactions of the board as it may direct. He shall receive all applications for purchasing, leasing, entering, locating or in any manner acquiring title to, interest in, or any benefit from or use of any lands belonging to or under the control of the state of Wyoming, and he shall allow or disallow, subject to the approval of the board of land commissioners, such applications to purchase, lease, enter or otherwise acquire title to, interest in, benefit from or use of the lands, or the appurtenances thereof, and in all cases where there have been no conflicting

---

2. The commissioner of public lands is appointed and removable by the Governor with senatorial confirmation for a term of two years. Section 36-3-101, W.S.1977. He keeps the records of the board of land commissioners and acts as secretary without vote. In a completely different constituency, the five elected officials are ex-officio members of the board of land commissioners, and have co-equal rights in voting subject to the designation of the Governor to act as president of the board. Section 36-2-103, W.S.1977. In the convoluted nature of Wyoming state government, the board and not the Governor appoints the state forester, § 36-2-108, W.S.1977, who heads the state forestry division and is under the supervision of the commissioner of public lands.

applications, he shall report his decisions to the board for its approval at its next ensuing regular or special meeting, but in all cases where there have been conflicting applications to lease or otherwise acquire interests or benefits in the lands, he shall, before reporting his decisions to the board, give each of the applicants notice of what his decision is with reference to their applications, and if none of the applicants files an appeal in writing from the decisions of the commissioner to the board within a period of thirty (30) days, except in the case of oil and gas leases when the period shall be not less than ten (10) days nor more than thirty (30) days at the discretion of the board, after the date of the notice, the commissioner shall report his decision to the board for approval at its next meeting and in case an appeal in writing is taken from the decision of the commissioner to the board of land commissioners within the time provided, the commissioner shall give each of the applicants at least ten (10) days' notice, except in the case of oil and gas leases when the period shall be five (5) days' notice in writing of the date on which the appeal will be heard by the board. * * *" Section 36-3-102(a), W.S. 1977 (1988 Cum. Supp.).

Provision for judicial appeal is provided in § 36-2-206, W.S.1977 from the state board, but no similar provision is included as to any direct appeal from the commissioner of public lands or the land office which would encompass judicial review without first exhaustion of the administrative authority and final decisional power of the board of land commissioners.

The board's primary jurisdiction over state lease cancellation is designated in § 36-5-113, W.S. 1977:

"The board shall have the power and authority to cancel leases procured by fraud, deceit or misrepresentation, or for use of lands for unlawful or illegal

> purposes, or for the violation of the covenants of the lease, upon proper proof thereof."

See also § 36-6-101, W.S. 1977, for designation of authority for oil and gas leases as conforming to the Constitution.

This relationship between the land office, the commissioner of public lands, and the board of land commissioners was specifically addressed by this court in Reese v. Bruegger Ranches, Inc., Wyo., 463 P.2d 23, 25 (1969):

> "Under art. 18, § 3, Wyoming Constitution, and under § 36-14, W.S.1957, constitutional and statutory authority is granted to the Board of Land Commissioners to lease lands of the state. Thus, the Commissioner could not finally determine what rental would be due in a contested case of this kind, without the Board's approval; and if he attempted to notify the contestee that the contestee had to accept his recommendation and pay the balance recommended by him, such notice would be premature if it preceded action by the Board.
>
> * * * * * *
>
> "It will be noticed that § 36-34 [presently § 36-3-102, W.S.1977[requires the Commissioner to give notice to the contesting parties of his decision. Even if there is no appeal, he still must report his decision to the Board for approval at its next meeting. * * *
>
> "* * * There can be no doubt that the Board is free to follow or to modify or to disregard what the Commissioner has recommended."

In regard at least to the issue of this case, an oil and gas lease cancellation or nonrenewal, it is clear that the basic administrative jurisdiction rests with the board of land commissioners. There may be functions of the commissioner of public lands where direct reference to the

court for judicial review might exist, but this case is certainly not of that category.

I would hold that neglect of the lease-right litigant to seek board review forecloses any direct appeal by review from the courts. Consequently, I specially concur that no decision was made which is properly now presented here for judicial review. This court addressed an almost identical issue involving the state engineer and the state board of control, by an order in Wyoming Water, Inc. v. George L. Christopulos, No. 86-177, dated December 3, 1987, remanding to the district court for entry of an order remanding the case to the state board of control, with instructions that a hearing be held by the state board of control. Cf. Willadsen v. Christopulos, Wyo., 731 P.2d 1181 (1987), and Green River Development Co. v. FMC Corp., Wyo., 660 P.2d 339 (1983), Thomas J., specially concurring. The Wyoming Water case did at least pass through the board of control, which affirmed without hearing, and which is absent in this case where reference to the responsible administrative agency with final decision was never requested nor provided. See Battle, *Administrative Law, Wyoming Style,* XVIII Land & Water L.Rev. 223, 256 (1983) to "agencies with very substantial powers—e.g., the Board of Land Commissioners," and others. Unfortunately, nothing in this extended law journal article discussed the supposition that intermediate agency personnel might make final agency decisions. For a discussion of the general authority of the board of land commissioners under the Constitution and statutes, see Mayor v. Board of Land Com'rs, 64 Wyo. 409, 192 P.2d 403, reh'g denied 195 P.2d 752 (1948); State ex rel. Cross v. Board of Land Commissioners, 50 Wyo. 181, 62 P.2d 516 (1936); and

State ex rel. Walls v. State Board of Land Com'rs, 36 Wyo. 302, 254 P. 491 (1927). The doctrine of exhaustion of administrative remedies was directly addressed by this court in People v. Fremont Energy Corp., Wyo., 651 P.2d 802 (1982) and City of Cheyenne v. Sims, Wyo. 521 P.2d 1347 (1974).

> "* * * The exhaustion doctrine applies where an agency alone has been granted or found to possess exclusive jurisdiction over the case. The purpose of the doctrine then is to avoid premature interruption of the administrative process where the agency has been created to apply a statute in the first instance. * * *" People v. Fremont Energy Corp., supra, 651 P.2d at 811.

This policy application summarizes my analysis in this case, and I consequently submit this special concurrence.

Supreme Court, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1028

In The

Supreme Court of the United States

October Term, 1988

MOIRA Q. SCANLON,

Petitioner,

v.

HOWARD M. SCHRINAR, Commissioner of Public Lands, State of Wyoming and AMOCO PRODUCTION COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

RESPONDENT HOWARD M. SCHRINAR'S BRIEF IN OPPOSITION

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January, 1988

10 pp

QUESTION PRESENTED

Was the Wyoming Supreme Court correct in holding that it had no jurisdiction to consider a petition for review of agency action because the petitioner failed to file her petition for review within the time limit specified by Rule 12.04, Wyoming Rules of Appellate Procedure?

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Wyoming Rules of Appellate Procedure, Rule 12.04.

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RESPONDENT HOWARD M. SCHRINAR'S BRIEF IN OPPOSITION

Respondent Howard M. Schrinar, Commissioner of Public Lands, State of Wyoming, (Commissioner), respectfully asks the Court to deny the petition for a writ of certiorari for the reasons set forth below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Wyoming Rules of Appellate Procedure, Rule 12.04:

In a contested case, or in a non-contested case where a statute places a time limit on appeal, the petition for review shall be filed within thirty (30) days after written certified notice to all parties of the final decision of the agency or denial of the petition for a rehearing, or, if a rehearing is

held, within thirty (30) days after written, certified notice to all parties of the decision thereon. . . .

2. Rules and Regulations Governing Leasing of Subsurface Resources, Board of Land Commissioners, Section 9, *Rentals*:

Annual rentals on all leases shall be payable in advance for the first year and each year thereafter. No notice of rental due shall be sent to the lessee. If the rental is not paid on or before the date it becomes due, notice of default will be sent to the lessee, and a penalty of $0.50 will be assessed.

The lessee is not legally obligated to pay either the rental or the penalty, but if the rental and penalty are not paid within 30 days after the notice of default has been received, the lease will terminate automatically by operation of law.

STATEMENT OF FACTS

Petitioner failed to pay her advance rental on State Oil & Gas Lease No. 83-00040 when it came due, January 1, 1986. The lease provided, at Section 1 (c):

> Annual rentals on all leases shall be payable in advance for the first year and each year thereafter. No notice of rental due shall be sent to the lessee. If the rental is not paid on or before the date it becomes due, notice of default will be sent to the lessee, and a penalty of $0.50 per acre for late payment will be assessed.
>
> The lessee is not legally obligated to pay either the rental or the penalty, but if the rental and penalty are not paid within thirty

> (30) days after the notice of default has been received, the lease will terminate automatically by operation of law.

See also, Rules and Regulations Governing Leasing of Subsurface Resources, Board of Land Commissioners, Section 9, *Rentals.*

The Commissioner's office sent to Petitioner, via certified mail, postmarked January 23, 1986, notice of her default in making her advance rental payment. On February 10, 1986, the certified letter was returned to the Commissioner's office by the United State Postal Service marked "unclaimed".

A portion of the oil and gas rights covered by State Oil and Gas Lease No. 83-00040 were leased to Respondent Amoco Production Company by the State of Wyoming, Board of Land Commissioners on August 2, 1986.

In January, 1987 the Commissioner received the following letter from Petitioner:

> Dear Sir:
>
> Enclosed is a check for $3,840.00 for the taxes due plus late penalty charges on Lease #83-00040 Parcel #699 in Sheridan County, Wyoming. This check should cover total owed to the state.
>
> I thank you for your patience in the matter and apologize for my own tardiness in attending to it.
>
> Respectfully,
> Moira Q. Scanlon
> 32 Seaver St.
> E. Taunton, Ma. 02718

The Commissioner's office returned Petitioner's check to her on January 15, 1987. On February 5, 1987, Petitioner's attorney resubmitted the same check to the Commissioner on behalf of Petitioner and requested that the Commissioner "reinstate her lease". On February 12, 1987, the Commissioner's attorney returned the check to Petitioner's attorney and informed him that the terminated lease would not be reinstated.

Petitioner filed her petition for review in the First Judicial District Court of Wyoming on March 10, 1987.

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the decision below is based on independent and adequate state grounds. In addition, the issue is not of sufficient importance to merit review by this Court.

First, it is clear from the opinion of the Wyoming Supreme Court that the case was decided on the basis of a state rule of procedure. *Scanlon v. Schrinar*, 759 P.2d 1243, 1246 (Wyo. 1988). The court found that it had no jurisdiction to hear her case because the petition for review was untimely filed under Rule 12.04, Wyoming Rules of Appellate Procedure (W.R.A.P.). The requirement to timely file a petition for review in Wyoming is jurisdictional. *Curtis v. Center Realty Company*, 502 P.2d 365 (Wyo. 1972). This requirement has been applied consistently by the Wyoming Supreme Court. See *Department of Revenue & Taxation v. Irvine*, 589 P.2d 1295 (Wyo. 1979), *Stagner v. Wyoming State Tax Commission*, 642 P.2d 1296 (Wyo. 1982). There is a legitimate state interest in establishing time limits for requesting judicial review of agency actions. Without such time limits, there would be no finality of agency actions.

Second, this is a simple contract case which raises no important legal issues. Petitioner clearly failed to pay her rental when due and then failed to pick up her certified mail. By the terms of the contract, the contract automatically terminated. Petitioner then implored the Commissioner to restore the contract by tendering her rental payment over one year late. The Commissioner was under no obligation, nor was it legally possible for him to restore her terminated lease.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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